Pannir Selvam a/l Sinnaiyah & Anor v Tan Chia Foo & Ors

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCvC-273–12 OF 2017
EVROL MARIETTE PETERS JC
23 DECEMBER 2019

Contract — Agreement — Agreement of sale and purchase of property — Whether parol evidence rule applied — Whether circumstances leading to agreement were suspicious — Whether terms of the agreement were unusual and suspicious — Whether the agreement was valid and enforceable — Whether second defendant was a bona fide purchaser for valuable consideration

Evidence — Admissibility — Whether evidence of similar facts were admissible — Whether WhatsApp message and deposit transaction records were relevant and admissible — Whether evidence of witnesses, SP1, SP2 and SD1 were credible

The plaintiffs who were husband and wife and the former registered owner of the property. Had executed documents before an advocate and solicitor ('SP1') and had entered into an agreement ('the agreement') with the first defendant, an individual, for the purported sale of the property. The property was transferred and registered in the name of the first defendant on 26 November 2017, who subsequently transferred it to the second defendant, another individual who became the registered owner of the property. The plaintiff refused to vacate the property and proceeded to file the suit to recover the property on the basis that the agreement they had entered into with the defendant was a sham and an illegal moneylending transaction. The plaintiffs obtained a judgment in default ('JID') against the first defendant on 17 April 2018, but the JID was set aside on 6 September 2019, by which time the property had already been transferred and registered in the name of the second defendant. The plaintiff's contended that although the documents they signed appeared to be for the execution of sale and purchase, they were in actual fact a façade for an illegal money-lending transaction and the terms of the agreement itself revealed that the same was fictitious and a sham. The plaintiff further claimed that that the defendants' inability to repay the loan led to the transfer of the property to the name of the first defendant, who then transferred it to the second defendant. According to the plaintiffs, the land was used as a security for the loan that the first plaintiff had obtained. The plaintiff alleged that the transfer was made with both first and second defendants having the knowledge of the JID, as the JID was set aside only on 6 September 2018, whilst the transfer to the second defendant was only on 6 September 2018. The issues were: (a) whether the parol evidence rule applied; (b) whether the

circumstances leading to the agreement were suspicious; (c) whether the *WhatsApp* message and deposit transaction records were relevant and admissible; (d) whether evidence of similar facts admissible; (e) whether the terms of the agreement were unusual and suspicious; (f) whether the evidence of witnesses, SP1, SP2 and SD1 were credible; and (g) whether the second defendant was a bona fide purchaser for valuable consideration.

Held, allowing the plaintiffs' claim in part with costs of RM15,000:

(1) The reliance on the parol evidence rule by the first defendant was misconceived, as the plaintiffs were not denying that they signed all the documents in question. The oral evidence by the plaintiffs in court was not for the purpose of contradicting, varying, adding to or subtracting the terms of the agreement, but to explain that those documents were a façade to an illegal moneylending scheme. The argument of counsel for the first defendant was misconceived as the oral evidence of the first plaintiff was not caught by the exclusion of parol evidence rule as envisaged in ss 91 and 92 of the Evidence Act (see paras 26–27).

(2) It was baffling, unusual and highly suspicious for an owner to enter into the sale of his property and then rescinded it soon after, upon payment of agreed liquidated damages, only to enter into a second sale of the same property and then rescinded it like he did for the first one and subsequently entered into a third agreement, all within the time period of less than two years. It did not resonate with the contention of the first defendant that the agreement reflected the plaintiff's genuine intention to sell their property (see para 43).

(3) The court agreed with the plaintiff's contention based on the parallels drawn to the case of *Lim Choon Hau v Simpson Wong* where the court held that *Whatsapp* messages were direct evidence of the receipt of money as a friendly loan from the plaintiff. The documents produced by a computer still admissible in the absence of fulfilment of the requirements under s 90A of the Evidence Act, if it was admissible under another exception to the rule against hearsay. The court viewed that the *WhatsApp* messages were relevant and admissible as they demonstrated the connection to the facts in issue so as to form part of the same transaction. It triggered the application of s 6 of the Evidence Act (see paras 57, 61 & 67).

(4) Since it was found that the *WhatsApp* messages were admissible, the issue of whether the evidence of the previous agreements was admissible to render probable that the agreement that was in dispute, was a sham and unenforceable (see para 69).

(5) The facts were strong indications that the parties had not intended to enter into a sale and purchase agreement but instead, executed the relevant documents to facilitate the property to be used as a security for a

loan. The execution of the agreement, Form 14A, letter seeking redemption statement from HSBC and the CKHT forms pointed to an irresistible conclusion that the agreement dated 4 May 2016 and other documents in relation to the same were a façade to a money lending transaction and therefore a sham agreement to cloak the true intention of the parties (see para 92).

(6) The evidence of SP1 who was evasive and claimed ignorance to many material facts should be treated with extreme caution as SP1 could not justify several unusual features of the agreement and merely took instructions. For SP2, the court had to view with circumspection. The evidence of SP2 was intact even after cross examination although there was a tendency to veer into irrelevant matters. The discrepancies in SP2's evidence was minor and he was a convincing witness. The evidence of SD1 was questionable and unsupported in his averments and claims. It was found that SD1 was unconvincing and implausible as SD1 was not only contradicting himself, but was evasive and feigned to questions which the answers were not favourable to him (see paras 97–99).

(7) The security transaction which was not recognised by the National Land Code ('the NLC') but acknowledged by courts as a pure contract of sale was the *jual janji* transaction. The manner in which the property was used as a security for the loan was neither recognised by the NLC, nor was it a *jual janji* transaction. The agreement was, therefore, illegal, against public policy and defeats the purpose of the law (see paras 121–123).

(8) It was undisputed that the first defendant had transferred the land to the second defendant. Since it was the court finding that the agreement was a sham and against the law, the first defendant's title was defeated pursuant to s 340(2)(c). Since the title of the first defendant is defeated pursuant to s 340(2)(c) of the NLC, it follows that the titles transferred to the second defendant is able to establish that he is a bona fide purchaser for valuable consideration (see paras 128 & 130).

(9) Although counsel for the first and second contended that the property had already been transferred to the second defendant before the first defendant was aware of the JID, it was found the circumstances in which the first defendant came to know of the JID highly suspicious, bearing in mind that he was informed by counsel for the second defendant and that the knowledge of a solicitor was regarded by the law as the knowledge of the client. The second defendant was not entitled to the benefit of the proviso in s 340(3) of the NLC as he had not proved to be a bona fide purchaser for valuable consideration (see paras 142–143).

[Bahasa Malaysia summary

Plaintif yang merupakan suami isteri dan bekas pemilik berdaftar hartanah tersebut. Telah menandatangani dokumen di hadapan peguambela dan

peguambela ('SP1') dan telah memasukki suatu perjanjian ('perjanjian tersebut') dengan defendan pertama, seorang individu, dengan tujuan untuk penjualan hartanah tersebut. Hartanah tersebut telah dipindahmilik dan didaftarkan ke atas nama defendan pertama pada 26 November 2017, yang kemudiannya memindahmiliknya kepada defendan kedua, individu lain yang menjadi pemilik berdaftar hartanah tersebut. Plaintif enggan untuk mengosongkan hartanah tersebut dan selanjutnya memfailkan tuntutan untuk mendapatkan kembali hartanah tersebut dengan alasan perjanjian yang dimasukki merek dengan defendan adalah transaksi palsu dan pinjaman wang haram. Plaintif memperoleh penghakiman terus ('JID') terhadap defendan pertama pada 17 April 2018, tetapi JID tersebut telah diketepikan pada 6 September 2019, yang mana pada masa itu harta tersebut telah dipindahmilik dan didaftarkan ke atas nama defendan kedua. Plaintif berpendapat bahawa walaupun dokumen yang mereka tandatangani seperti untuk pelaksanaan jual beli, sebenarnya dokumen tersebut adalah suatu fasad untuk transaksi pinjaman wang haram dan syarat-syarat perjanjian tersebut sendiri menunjukkan bahawa perkara itu adalah rekaan dan palsu. Plaintif selanjutnya mendakwa bahawa ketidakupayaan defendan untuk membayar balik pinjaman telah menyebabkan pindahmilik hartanah tersebut ke atas nama defendan pertama, yang kemudian memindahmilik kepada defendan kedua. Menurut plaintif, hartanah tersebut digunakan sebagai jaminan pinjaman yang telah diperolehi oleh plaintif pertama. Plaintif mendakwa bahawa pindahmilik telah dilakukan dengan kedua-dua defendan pertama dan kedua mempunyai pengetahuan mengenai JID, kerana JID diketepikan hanya pada 6 September 2018, sementara pindahmilik ke atas defendan kedua hanya dibuat pada 6 September 2018. Isu-isu adalah: (a) sama ada peraturan keterangan parol digunapakai; (b) sama ada keadaan yang membawa kepada perjanjian tersebut mencurigakan; (c) sama ada pesanan *WhatsApp* dan rekod transaksi deposit relevan dan boleh diterima; (d) sama ada keterangan pada fakta serupa boleh diterima; (e) sama ada syarat-syarat perjanjian tersebut tidak biasa dan mencurigakan; (f) sama ada keterangan saksi, SP1, SP2 dan SD1 boleh dipercayai; dan (g) sama ada defendan kedua adalah pembeli suci hati dengan balasan berharga.

Diputuskan, membenarkan sebahagian tuntutan plaintif dengan kos RM15,000:

(1) Ketergantungan pada peraturan keterangan parol oleh defendan pertama suatu salah faham, kerana plaintif tidak menafikan bahwa mereka menandatangani kesemua dokumen yang dimaksudkan. Keterangan lisan oleh pihak plaintif di mahkamah bukan bertujuan untuk menyangkal, mengubah, menambah atau mengurangkan syarat-syarat perjanjian, tetapi untuk menjelaskan bahawa dokumen-dokumen tersebut merupakan fasad kepada skim pinjaman wang haram. Hujahan peguamcara bagi defendan pertama adalah suatu salah faham kerana

keterangan lisan plaintif pertama tidak termasuk dalam pengecualian peraturan keterangan parol seperti yang diperuntukkan di s 91 dan 92 Akta Keterangan (lihat perenggan 26–27).

(2) Ianya adalah membingungkan, pelik dan sangat mencurigakan bagi pemilik untuk memasuki penjualan hartanahnya dan kemudian membatalkannya dengan segera, setelah pembayaran ganti rugi dipersetujui, hanya untuk memasukki penjualan kedua hartanah yang sama dan kemudian membatalkannya seperti yang dilakukannya untuk yang pertama dan kemudian memasukki perjanjian ketiga, semuanya dalam jangka masa kurang dari dua tahun. Ianya tidak selari dengan pendapat defendan pertama bahawa perjanjian tersebut mencerminkan niat sebenar plaintif untuk menjual hartanah mereka (lihat perenggan 43).

(3) Mahkamah bersetuju dengan pendapat plaintif berdasarkan kesaksamaan dengan kes *Lim Choon Hau v Simpson Wong* di mana mahkamah memutuskana bahawa pesanan *Whatsapp* adalah bukti secara langsung penerimaan wang sebagai pinjaman persahabatan dari pihak plaintif. Dokumen yang dihasilkan oleh komputer masih boleh diterima sekiranya tidak memenuhi syarat-syarat di bawah s 90A Akta Keterangan, sekiranya ianya boleh diterima di bawah pengecualian lain pada peraturan terhadap dengar cakap. Mahkamah berpendapat bahawa pesanan *WhatsApp* adalah relevan dan dapat diterima kerana ia menunjukkan hubungan dengan fakta-fakta dalam isu sehingga menjadi sebahagian daripada transaksi yang sama. Ini menyebabkan penggunaan s 6 Akta Keterangan (lihat perenggan 57, 61 & 67).

(4) Oleh kerana ianya telah didapati bahawa pesanan *WhatsApp* dapat diterimamasuk, isu sama ada bukti perjanjian sebelumnya dapat diterimamasuk untuk memberi keimbangan bahawa perjanjian yang dipertikaikan tersebut adalah palsu dan tidak dapat dilaksanakan (lihat perenggan 69).

(5) Fakta-fakta tersebut merupakan petunjuk mantap bahawa pihak-pihak tidak berniat untuk memasuki perjanjian jual beli tetapi sebaliknya, menandatangani dokumen-dokumen yang munasabah untuk mempercepatkan hartanah tersebut digunakan sebagai jaminan pinjaman. Perjanjian, Borang 14A, surat yang memohon penyata penebusan dari HSBC dan borang CKHT yang ditandatangani menunjukkan kesimpulan yang tidak dapat disangkal bahawa perjanjian bertarikh 4 Mei 2016 dan dokumen lain yang berkaitan dengannya adalah fasad bagi transaksi pinjaman wang dan oleh itu perjanjian palsu tersebut adalah untuk menutup niat sebenar pihak-pihak (lihat perenggan 92).

(6) Keterangan oleh SP1 yang mengelak dan mengakui tidak mempunyai

pengetahuan pada kebanyakan fakta penting harus ditangani dengan sangat berhati-hati kerana SP1 tidak dapat memberikan justifikasi pada beberapa ciri luar biasa perjanjian tersebut dan hanya mengambil arahan. Bagi SP2, mahkamah harus melihat dengan waspada. Keterangan SP2 masih utuh walaupun setelah pemeriksaan balas walaupun terdapat kecenderungan untuk pergi ke arah perkara yang tidak relevan. Percanggahan keterangan SP2 adalah kecil dan beliau adalah saksi yang meyakinkan. Keterangan SD1 adalah dipersoalkan dan tidak menyokong dakwaan dan tuntutannya. Ianya didapati bahawa SD1 tidak meyakinkan dan tidak masuk akal kerana SD1 tidak hanya bercanggah dengan dirinya sendiri, tetapi juga mengelak dan berpura-pura pada soalan yang jawapannya tidak berpihak padanya (lihat perenggan 97–99).

(7) Transaksi bagi jaminan yang tidak diakui oleh Kanun Tanah Negara ('KTN') tetapi diakui oleh mahkamah sebagai kontrak jualan semata-mata adalah transaksi *jual janji*. Cara di mana hartanah digunakan sebagai jaminan pinjaman tidak diakui oleh KTN, dan juga pada transaksi jual beli. Oleh itu, perjanjian tersebut bertentangan undang-undang awam dan bercanggah dengan tujuan undang-undang (lihat perenggan 121–123).

(8) Ianya tidak dipertikaikan bahawa defendan pertama telah memindahmilik hartanah tersebut kepada defendan kedua. Oleh kerana mahkamah mendapati bahawa perjanjian tersebut adalah palsu dan melanggar undang-undang, hak milik defendan pertama disangkal berdasarkan s 340(2)(c). Oleh kerana hak milik defendan pertama disangkal berdasarkan s 340(2)(c) KTN, maka hak milik yang dipindahkan kepada defendan kedua dapat membuktikan bahawa beliau adalah pembeli suci hati bagi balasan berharga (lihat perenggan 128 & 130).

(9) Walaupun peguamcara defendan pertama dan kedua berpendapat bahawa hartanaht tersebut telah dipindahmilik kepada defendan kedua sebelum defendan pertama mengetahui JID, namun ianya telah didapati bahawa keadaan di mana defendan pertama mengetahui JID sangat mencurigakan, harus diingatkan bahawa beliau dimaklumkan oleh peguamcara untuk defendan kedua dan bahawa pengetahuan seorang peguamcara dianggap oleh undang-undang sebagai pengetahuan anak guam. Defendan kedua tidak berhak mendapat keuntungan dari proviso dalam s 340(3) KTN kerana beliau tidak dibuktikan sebagai pembeli suci hati bagi balasan berharga (lihat perenggan 142–143).]

Cases referred to

Abu Bakar Ismail & Anor v Ismail Hussin & Ors & Other Appeals [2007] 3 CLJ 97, CA (refd)

Adel Muhd El-Dabbah v AG of Palestine [1944] AC 156, PC (refd)
Al-Bakhtiar bin Samat v PP [2012] 4 MLJ 713, CA
Arab Merchant Bank Bhd v Chong On Foh Medical Hall & Liquor Dealers [1997] 4 MLJ 532; [1996] 2 CLJ 667, HC (refd)
Au Meng Nam & Anor v Ung Yak Chew & Ors [2007] 5 MLJ 136; [2007] 4 CLJ 526, CA (refd)
Azahan bin Mohd Aminallah v PP [2005] 5 MLJ 334, CA (refd)
Bank Bumiputra (M) Bhd v Mohd Ibrahim bin Salleh [2000] 5 MLJ 778, HC (refd)
Bank of Tokyo-Mitsubishi (Malaysia) Bhd v Sim Lim Holdings Bhd & Ors [2001] MLJU 125; [2001] 2 CLJ 474, HC (refd)
Bombay Cotton Manufacturing Company v Motilal Shivlal ILR 1915 39 Bom 386, PC (refd)
Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62, CA (refd)
Director of Public Prosecutions v Boardman [1975] AC 421, HL (refd)
Gangabai v Chhabubai AIR [1982] SC 20, SC (refd)
Jaafar bin Shaari & Anor (Suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693, SC (refd)
Kuan Chee Jon & Ors v SSF Construction Sdn Bhd [2016] MLJU 1173; [2016] 8 CLJ 521, HL (refd)
Kubota Agricultural Machinery Sdn Bhd v Shahrizan Sdn Bhd & Anor [2001] MLJU 71; [2001] 6 CLJ 104, HC (refd)
Kuppusamy v Anggamah & Anor [1992] 1 MLJ 602; [1991] 3 CLJ Rep 97, HC (refd)
Kwang Boon Keong Peter v PP [1998] 2 SLR 592, HC (refd)
Lim Choon Hau v Simpson Wong [2019] 1 LNS 217, HC (refd)
McAllister v Campbell [2014] NIQB 24, QBD (refd)
Mohamad Fauzi bin Che Rus v JR Joint Resources Holdings Sdn Bhd [2016] 8 MLJ 739; [2016] 6 CLJ 266, HC (refd)
Mohd Khayry bin Ismail v Public Prosecutor [2014] 4 MLJ 317; [2014] 1 LNS 412, CA (refd)
Mohammad bin Abdullah v Public Prosecutor [2011] 4 MLJ 549, CA (refd)
Mood Music Publishing Co Ltd v De Wolfe Ltd [1976] 1 All ER 763, CA (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Murugan v Lew Chu Cheong [1980] 2 MLJ 139 (refd)
Ngai Fong Lan (P) & Anor v Li Chee Loong [2018] MLJU 1518, HC (refd)
Pang Ah Chee v Chong Kwee Sang [1985] 1 MLJ 153, FC (refd)
Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd [1986] 2 MLJ 30, SC (refd)
Poraviappan s/o Arunasalam Pillay v Periasamy s/o Sithamharanm Pillai & Anor [2001] 1 MLJU 742, HC (refd)
PP v Mohamad Roslan bin Desa [2011] 4 MLJ 826, FC (refd)
R Saravanan Ramasamy v Yap Chee Loong & Ors [2016] 1 LNS 547, HC (distd)
Sabah Shell Petroleum Co Ltd & Anor v The Owners of and/or Any Other Persons

Interested in The Ship or Vessel the 'Borcos Takdir' [2012] 5 MLJ 515, HC (refd)
Sean Thornton (a minor by his mother and next friend) v Northern Ireland Housing Executive [2010] NIQB 4, QBD (folld)
Sediabena Sdn Bhd v China Comservice (Hong Kong) Limited [2017] 1 LNS 2042, CA (folld)
Snook v London and Vest Riding Investments Limited [1967] 2 QB 786, CA (refd)
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 MLJ 324; [2001] 1 CLJ 779, CA (refd)
T Sivam a/l Tharamalingam (as representative/administrator for the estate of Nagamuthu a/l Periasamy, deceased) v Public Bank Bhd [2018] 5 MLJ 711; [2018] 6 CLJ 1, FC (refd)
Toh Teck Sun v Mandarin Gardens Pte Ltd [1988] 2 MLJ 276 (refd)
Wong Kok Chun lwn PP [2012] 3 MLJ 593, CA (refd)

Legislation referred to

Contracts Act 1950 s 24(b), (e)
Evidence Act 1950 ss 6, 15, 56, 57, 57(1), 73A, 73A(2), 90A, 90A(2), 91, 92, 114, 114(g), 115, 146
Moneylenders Act 1951
National Land Code ss 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 266A, 267, 267A, 268, 268A, 269, 270 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 340(2)(c), (3), Form 14A
Rules of Court 2012 O 34 r 2

John Fernandez (R Muthu & Co) for the plaintiff.
CS Lim (Lim & Partners) for the first defendant.
David Leow (Tng, Liew, David Leow & Co) for the second defendant.
Mohd Khairi bin Mohamed Said (State Legal Adviser) for the third defendant.

Evrol Mariette Peters JC:

THE CLAIM

[1] The plaintiffs' claim is for, inter alia, the following:

(a) a declaration that the first defendant is an unlicensed moneylender;

(b) a declaration that the sale and purchase agreement dated 4 May 2016 between the plaintiffs and first defendant is a sham which masked an illegal moneylending agreement, and is therefore unlawful, against the law, and unenforceable;

(c) an order that the transfer (81301/2017) of the property (HS(D) 313850 PTD 89921 Mukim Pulai, Daerah Johor Bahru) ('the property') to the first defendant dated 26 November 2017, and the subsequent transfer of the property to the second defendant dated 7 May 2018, be cancelled and set aside;

(d) an order that the second defendant surrender the document of title of the property to the solicitors for the plaintiffs, for the purpose of cancelling and setting aside the transfer and to register the names of the plaintiffs as the owners of the property;

(e) an order that if the second defendant fails to do so in the time period determined by the court, that the senior assistant/deputy registrar sign the necessary forms to effect the transfer to the plaintiffs;

(f) an order that the third defendant make the necessary endorsement on the document of title to the property to give effect to the order; and

(g) further and in the alternative, for an order that the first defendant surrender the accounts of the moneylending transactions between himself and the plaintiffs within 14 days of the order of the court.

[2] The second defendant counterclaimed against the plaintiffs and first defendant for, amongst others, vacant possession of the property, and against the first defendant for the sum of MYR16,192 calculated according to cl 10 of the sale and purchase agreement dated 15 March 2018, between him and the first defendant.

[3] I allowed the plaintiffs' claim, except for prayers (a) and (g) above, and dismissed the second defendant's counterclaim. The first and second defendants have appealed and the following are reasons for my decision:

THE BRIEF FACTS

[4] On 4 May 2016, the plaintiffs who are husband and wife and the former registered owners of the property, had executed documents before an advocate and solicitor ('SP1'), and had entered into an agreement ('the agreement') (exhibited at pp 23–37 of the Part B of common bundle of documents ('CBD')) with the first defendant, an individual, for the purported sale of the property. The property was transferred and registered in the name of the first defendant on 26 November 2017 (evidenced by the land search results dated 13 December 2017, exhibited at pp 68–70 of Part B of the CBD), who subsequently transferred it to the second defendant, another individual, who became the registered owner of the property on 7 May 2018 (evidenced by the land search results dated 6 September 2018, exhibited at pp 97–98 of Part B of the CBD).

A **[5]** The plaintiffs refused to vacate the property, and proceeded to file this suit to recover the property on the basis that the agreement they had entered into with the first defendant was a sham, and in actual fact, an illegal moneylending transaction.

B **[6]** The plaintiffs obtained a judgment in default ('JID') against the first defendant on 17 April 2018, but that JID was set aside on 6 September 2018, by which time the property had already been transferred and registered in the name of the second defendant.

C THE PLAINTIFFS' CASE

[7] The plaintiffs' case is that although the documents they signed appeared to be for the execution of the sale and purchase of their property, they were in actual fact a façade for an illegal money-lending transaction, and the terms of the agreement itself, reveal that the same is fictitious and a sham.

D

[8] According to the plaintiffs, the down-payment for the property purportedly paid by the first defendant in the amount of MYR40,000 was in fact, a loan given to the first plaintiff by one CK Lim.

E

[9] Upon receipt of the 'down-payment', the plaintiffs were instructed to deposit the loan interests of MYR2,000 to an account, the number of which was provided by CK Lim. The monthly interest was to be paid until full and final settlement of the loan.

F

[10] A lengthy completion period (12 months plus a one-month extension) for the agreement was provided, to enable the plaintiffs to repay the loan. Once the loan had been repaid, the plaintiffs were to execute a deed of rescission and revocation which would compel the plaintiffs to make payment in the form of agreed liquidated damages to the first defendant, which were in actual fact repayment of the loan amount.

G

H **[11]** The plaintiffs further claimed that their inability to repay the loan led to the transfer of the property to the name of the first defendant, who subsequently transferred it to the second defendant. According to the plaintiffs, the land was, in actual fact, used as a security for the loan that the first plaintiff had obtained.

I

[12] Although the plaintiffs obtained a JID against the first defendant on 17 April 2018, for the registration of the property in the name of the first defendant to be cancelled, it was subsequently discovered that the property had, instead, been transferred to the second defendant on 7 May 2018, via a

sale and purchase agreement between the first and second defendant for the purchase price of MYR420,000.

[13] The plaintiffs alleged that this transfer was made with both first and second defendants having the knowledge of the JID, as the JID was set aside only on 6 September 2018, whilst the transfer to the second defendant was made on 8 May 2018. Furthermore, the lawyer who had informed the first defendant of the JID was counsel for the second defendant, and, therefore, the plaintiffs averred that such knowledge is imputed to his client, the second defendant.

[14] The following are the plaintiffs' witnesses:

(a) Nurul Shafwaty bt Salleh ('SP1') — the solicitor who executed all documents pertaining to the agreement; and

(b) Pannir Selvam a/l Sinnaiyah ('SP2') — the first plaintiff.

THE FIRST DEFENDANT'S CASE

[15] The first defendant's case is that the plaintiffs voluntarily signed and executed, at the office of Messrs Woon Wee Yuen & Partners, the agreement, Form 14A, letter to the bank requesting for redemption statement and other necessary documents, to perfect the said transfer; and that the documents were executed before SP1, on their own free will, and without any threat, undue influence, or coercion whatsoever, by any party.

[16] The first defendant further averred that plaintiffs had also executed the relevant Cukai Keuntungan Harta Tanah ('CKHT') forms to be forwarded to the Lembaga Hasil Dalam Negeri ('LHDN') (exhibited at pp 104–129 of the Part B of the CBD).

[17] The first defendant claimed that there was no link between him and CK Lim, the purported moneylender, and that the plaintiffs' case was based on mere conjecture and speculation.

[18] The first defendant's sole witness was himself, Tan Chia Foo ('SD1').

THE SECOND DEFENDANT'S CASE

[19] The second defendant claimed that the first defendant had agreed to sell the property to him at a price of MYR420,000, and that all relevant documents in respect of the transfer were prepared by Messrs Goh Cheah & Chong, a firm of solicitors.

[20] A sum of MYR42,000 was then paid as a deposit to the legal firm out of which MYR12,000 was paid to the LHDN and the sum of MYR29,400 was paid to the first defendant. The amount of MYR378,000 was then paid to the first defendant as the balance purchase price.

[21] The second defendant claimed that he had no knowledge of the plaintiffs' claim against the first defendant, and that he was a bona fide purchaser, and had paid the balance purchase price for the property to be transferred to him.

[22] The second defendant also counterclaimed against the first defendant for the sum of MYR16,192, calculated according to cl 10 of the sale and purchase agreement between him and the first defendant dated 15 March 2018 (exhibited at pp 142–156 of the Part B of the CBD), and against both the plaintiffs and first defendant for vacant possession of the property.

[23] The second defendant's sole witness was himself, Ng Chin Wei ('SD2').

CONTENTIONS AND FINDINGS

The first defendant

Whether the parol evidence rule applied

[24] Counsel for the first defendant submitted that the plaintiffs had executed the documents willingly, and had placed their initials at all relevant pages, executed before SP1, and had done everything to perfect the sale, which included making submissions to the LHDN by executing the CKHT forms. Counsel for the first defendant, therefore, urged the court to invoke the parol evidence rule in s 92 of the Evidence Act 1950 ('the Evidence Act').

[25] Section 92 of the Evidence Act reads:

> Section 92 — Exclusion of evidence of oral agreement
>
> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:

[26] In my view, reliance on the parol evidence rule by the first defendant is misconceived, as the plaintiffs are not denying that they signed all the documents in question. The oral evidence by the plaintiffs in court was not for

the purpose of contradicting, varying, adding to or subtracting the terms of the agreement, but to explain that these documents were a façade to an illegal moneylending scheme.

[27] The argument of counsel for the first defendant is, therefore, misconceived, as the oral evidence of the first plaintiff was not caught by the exclusion of parol evidence rule, as envisaged by ss 91–92 of the Evidence Act.

[28] Furthermore, it is trite law that s 92 presupposes the validity of the transaction evidenced by the document. If the validity of the transaction is in question, and if it is being disputed, then the court is not bound by what has been described as the paper expression of the parties.

[29] On this proposition of law, I am guided by *Sarkar's Law of Evidence* (LexisNexis, Malaysian Ed Vol 11) at p 2212 where the application of s 92 of the Evidence Act is explained:

> Section 92 does not preclude a party from showing that the writing was not really the contract between the parties, but was only fictitious or colourable device which cloaked something else ... Oral evidence is admissible to show that an agreement was only a sham or nominal transaction and was not intended to be acted upon, or to show that a written agreement for the conveyance of property was only a fictitious sale to avoid execution proceedings against the property, or that a certain receipt is fictitious in the sense that no money was paid.

[30] Reference is also made to *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 MLJ 324; [2001] 1 CLJ 779, where Gopal Sri Ram JCA in adopting the approach by the Indian Supreme Court in *Gangabai v Chhabubai* AIR [1982] SC 20, clarified:

> In my judgment, s 92 of the Evidence Act had nothing whatever to do with this case. The judge was in error when he thought that it did. The appellants were not seeking to admit evidence to contradict the terms of the agreements that had been entered into. They wanted the court to see the real transaction behind the facade of the agreements. That this is permissible is settled by high authority. I will not go through all the cases here. Suffice that I mention just one.

[31] In a similar vein, the oral evidence adduced by the plaintiffs through SP2 was to establish that the agreement was a sham which masked an illegal moneylending agreement, and was therefore unlawful, against the law, and unenforceable. Sections 91 and 92 of the Evidence Act had no relevance whatsoever.

[32] Sham agreements are 'documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the

A appearance of creating between the parties, legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create': per Diplock LJ in *Snook v London and Vest Riding Investments Limited* [1967] 2 QB 786

B **[33]** It is 'a false label in which the express purpose does not correspond with the true purpose': per Lim Beng Choon J in *Kuppusamy v Anggamah & Anor* [1992] 1 MLJ 602; [1991] 3 CLJ Rep 97, where he adopted the explanation by Diplock LJ in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786

C

[34] In order to determine whether the agreement is a sham, it is pertinent to note that the court ought to have regard to all the circumstances, both before and at the time of the execution of the agreement.

D

Whether the circumstances leading to the agreement were suspicious

[35] It is not disputed that the plaintiffs, although financially strapped, had not advertised their property for sale, nor did they appoint an agent for the E same.

[36] The plaintiffs claimed that SP2 was in fact contacted by one CK Lim who offered them personal loans and told them that they had to execute several documents in relation to their property in order to obtain the loans.

F

Whether the two previous agreements formed a series of similar occurrence

[37] Counsel for the plaintiffs submitted that two previous agreements that the first plaintiff had entered into in respect of the same property, albeit with G purportedly different vendors, were relevant in this narrative.

[38] The first agreement dated 5 August 2014 ('the first agreement') was with one Tan Weng Giap, which was subsequently terminated by a deed of H rescission and revocation dated 14 July 2016 (exh P3) upon payment of MYR45,000 by the first plaintiff.

[39] Despite the fact that in the first agreement it was stated that only MYR30,000 (reflected on p 22 of the first agreement) was required to be paid I to Tan Weng Giap as agreed liquidated damages upon its rescission and revocation, the plaintiffs had paid MYR45,000 (exhs 'P1' and 'P2'). SP1, who was also the solicitor for the first agreement, was unable to explain to the court who prepared the deed of rescission and revocation, nor could she provide a justification for the additional MYR15,000 as agreed liquidated damages.

[40] On 14 July 2015, a second agreement ('the second agreement') was executed between the first plaintiff and one Tong Ming Sheng. The second agreement was also subsequently terminated by a deed of rescission and Revocation dated 2 November 2015 (exh 'P6') upon payment of MYR55,000 by the first plaintiff, as agreed liquidated damages (exhibited at p 42 of Part B of the CBD).

[41] On 4 May 2016, the plaintiffs, enter into a third agreement (the agreement, which is the subject matter of the dispute in this court), this time with the first defendant.

[42] The terms seem to be consistent in all three agreements where, although the actual market price at the material time was MYR460,000, the purchase price was about MYR213,000 for the first agreement, RM238,000 for the second agreement and MYR214,000 for the agreement which is being disputed in the present case.

[43] In my view, it is baffling, unusual, and highly suspicious for an owner to enter into the sale of his property and then rescind it soon after, upon payment of agreed liquidated damages, only to enter into a second sale of the same property and then rescind it like he did the first one, and subsequently to enter into a third agreement, all within the time period of less than two years. This, in my view, does not resonate with the contention of the first defendant that the agreement reflected the plaintiffs' genuine intention to sell their property.

[44] A further suspicious fact is that the documents for all agreements were prepared by the same firm of solicitors. However, SP1, who oversaw the execution of these documents, could not explain these unusual terms, save to say that it was the will of the parties, and that she merely took instructions.

[45] Upon signing the first and second agreements, Tan Weng Giap and Tong Ming Sheng had lodged caveats which were later removed upon repayment of the agreed liquidated damages, which counsel for the plaintiffs argued were in actual fact, the loan sums.

[46] Another similar fact pertaining to all three agreements was the payments made subsequent to the execution of such, which counsel for the plaintiffs claimed were in actual fact, the interests charged pursuant to the loans. The first agreement was executed on 5 August 2014. Subsequent to the signing of the first agreement, SP2 testified that he had deposited a sum of MYR2,250 to the account number provided by CK Lim *via WhatsApp* messages (deposit transaction records are exhibited at pp 174–177 of Part C of CBD).

A **[47]** In a similar fashion, subsequent to executing the second agreement with Tong Ming Sheng on 14 July 2015, SP2 had paid interest in the amount of MYR2,250 to the account number also provided by CK Lim (exhibited at pp 176–177 of Part C of the CBD).

B **[48]** On 4 May 2016, the plaintiffs executed this agreement with the first defendant and as was done subsequent to the first and second agreements, the first plaintiff paid a sum of money to an account number provided by CK Lim via *WhatsApp* (exhibited at pp 178–182 of Part C of CBD).

C Whether the *Whatsapp* messages and deposit transaction records were relevant and admissible

[49] At this juncture, it is crucial to address the admissibility of the documents in Part C of the CBD, in particular the *WhatsApp* messages and
D deposit transaction records that the plaintiffs relied on to support their contention that the all three agreements were a façade to an illegal moneylending scheme.

E **[50]** The *WhatsApp* messages were purportedly between SP2 and CK Lim, whereby SP2 claimed that CK Lim had provided the account numbers for SP2 to deposit the interest charged for the loan. These messages were marked as ID as counsel for the first defendant objected strenuously to it.

F **[51]** In his submission, counsel for the first defendant contended, relying on the case of *Jaafar bin Shaari & Anor (Suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693, that since these messages were not tendered as exhibits but were left as IDs, it, therefore, remains inadmissible.

G **[52]** I am unable to agree with this contention. First and foremost, it must be borne in mind that in *Jaafar bin Shaari & Anor v Tan Lip Eng & Anor* itself, it was explained by Gopal Sri Ram JCA:

> H Thirdly such documents therein do not form automatically a part of the evidence of the case in question ipso facto, *but any of such documents does become part of such evidence if it is read or referred to by either of the parties*, wholly or partly, at length or in a briefest of mention, either of examination of any witness, in submission at any stage or even on any unilateral drawing of court's attention to if by either of the parties at any time before the conclusion of the case ... (Emphasis added.)

I **[53]** During the course of the trial and based on the notes of evidence, counsel for the first defendant had also cross-examined SP2 on the documents marked as ID, and by virtue of *Jaafar bin Shaari & Anor v Tan Lip Eng & Anor* that he cited, the *WhatsApp* messages are admissible as evidence to demonstrate

that all three agreements that the plaintiffs entered into, in particular the agreement that is disputed in this court, were not genuine sale and purchase agreements, but rather a façade to money lending transactions.

[54] Furthermore, the procedure when dealing with ID documents is clear, that is, since they have not been classified as Part A or Part B documents under O 34 r 2 of the Rules of Court 2012 ('the Rules of Court'), the party tendering the ID document has to ensure that such document falls within at least one of the exceptions to the rule against hearsay. Documents that are marked as ID, therefore, are not automatically rendered inadmissible, but will be subject to the full force of the Evidence Act.

[55] This was also explained by Ramly Ali J (as he then was) in *Bank of Tokyo-Mitsubishi (Malaysia) Bhd v Sim Lim Holdings Bhd & Ors* [2001] MLJU 125; [2001] 2 CLJ 474:

> ... At that stage of the proceedings, all those documents have to be marked as 'ID' first, *but it does not stop the court from deciding on their admissibility at the end of the trial ie, during submissions stage*. Section 73A(2) of the Evidence Act 1950 empowers the court to do so. The said subsection provides for the exercise of the power 'at any stage of the proceedings, having regards to all the circumstance of the case'. There is nothing to say that those documents cannot be admitted as evidence under s 73A(2) just because they have only been marked as 'ID'... (Emphasis added.)

[56] During the course of the trial, I had specifically stated that although I was recording the objection to the *WhatsApp* messages, this issue should be left to submission for proper deliberation on the admissibility of such documents.

[57] Counsel for the plaintiffs submitted that, in the first place, these messages were reproduced from the cellphone belonging to SP2 himself, and therefore did not run foul of the rule against hearsay. I agree with counsel for the plaintiffs based on the parallels drawn to the case of *Lim Choon Hau v Simpson Wong* [2019] 1 LNS 217 where, in that case, it was held that *WhatsApp* messages were direct evidence of the receipt of money as a friendly loan from the plaintiff.

[58] SP2 testified to his own messages in court, and the issue was whether his evidence was credible enough to be accepted.

[59] Counsel for the first defendant further contended that the *WhatsApp* messages were documents produced by a computer as prescribed by s 90A of the Evidence Act 1950, and by virtue of such provision, a certificate must be tendered to prove that the documents were produced by the computer in the course of its ordinary use, as stipulated by s 90A(2) of the Evidence Act 1950.

[60] I am unable to agree with this submission, in view of the fact that he did not provide any authorities to support his contention that all *WhatsApp* messages amounted to documents produced by a computer, bearing in mind that the maker of those messages, who was SP2, was cross-examined.

[61] Secondly, even if those messages amounted to documents produced by a computer, there are authorities such as *Mohd Khayry bin Ismail v Public Prosecutor* [2014] 4 MLJ 317; [2014] 1 LNS 412 (CA) and *Mohamad Fauzi bin Che Rus v JR Joint Resources Holdings Sdn Bhd* [2016] 8 MLJ 739; [2016] 6 CLJ 266 to say that documents produced by a computer may still be admissible in the absence of fulfilment of the requirements under s 90A of the Evidence Act, if it is admissible under another exception to the rule against hearsay.

[62] The exception that renders admissible the *WhatsApp* messages as well as the deposit transaction records is s 73A of the Evidence Act. The plaintiffs were never going to be able to trace CK Lim and in that respect, the court is empowered under s 73A(2) of the Evidence Act to dispense with the requirement of the maker if it is just to do so. Section 73A(2) reads:

> Section 73A — Admissibility of documentary evidence in civil cases, etc
>
> ...
>
> (2) In any civil proceedings, *the court may at any stage of the proceedings, if having regard to all the circumstances* of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence —
>
> (a) *notwithstanding that the maker of the statement is available but is not called as a witness*; and
>
> (b) notwithstanding that the original document is not produced, if, in *lieu* thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be. (Emphasis added.)

[63] Counsel for the second defendant argued that it was for the plaintiffs to prove the unavailability of CK Lim. In my view, the unavailability of CK Lim has been proved, since it is obvious that CK Lim would never be found. Secondly, it is clearly stipulated in s 73A(2) of the Evidence Act that 'the court may at any stage of the proceedings, if having regard to all the circumstances of the case'. This means that the court has to act according to the individual facts of the case.

[64] The discretion prescribed by s 73A(2) of the Evidence Act was exercised

not only in *Bank of Tokyo-Mitsubishi (Malaysia) Bhd v Sim Lim Holdings Bhd & Ors* [2001] MLJU 125; [2001] 2 CLJ 474, but also in *Arab Merchant Bank Bhd v Chong On Foh Medical Hall & Liquor Dealers* [1997] 4 MLJ 532; [1996] 2 CLJ 667 and *Kubota Agricultural Machinery Sdn Bhd v Shahrizan Sdn Bhd & Anor* [2001] MLJU 71; [2001] 6 CLJ 104.

[65] In exercising my discretion under s 73A(2) of the Evidence Act, I am guided also by s 73A(5) which reads:

> Section 73A — Admissibility of documentary evidence in civil cases, etc
>
> ...
>
> (5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of subsections (1) to (4), *the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances,* and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner, and, where the proceedings are with assessors, the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason, it appears to it to be inexpedient in the interests of justice that the statement should be admitted. (Emphasis added.)

[66] It is obvious from the circumstances of this case that it would be impossible to locate CK Lim, and to call him as a witness to verify the *WhatsApp* messages. Furthermore, the *WhatsApp* messages were relevant to support the oral evidence of SP2, that he had dealt with CK Lim and made payments into the accounts, numbers of which were provided by CK Lim.

[67] It is my view, therefore, that the *WhatsApp* messages from pp 178–218 of Part C of the CBD are relevant and admissible, as they also demonstrate their connection to the facts in issue so as to form part of the same transaction. This triggers the application of s 6 of the Evidence Act, which reads:

> Section 6 — Relevancy of facts forming part of same transaction
>
> Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places.

[68] See also *Mohd Khayry Ismail v Public Prosecutor* [2014] 4 MLJ 317; [2014] 1 LNS 412 (CA) and *Mohamad Fauzi bin Che Rus v JR Joint Resources Holdings Sdn Bhd* [2016] 8 MLJ 739; [2016] 6 CLJ 266.

A Whether evidence of similar facts admissible

[69] Since it is my finding that the *WhatsApp* messages are admissible, the issue that arises is whether the evidence of the previous agreements is admissible to render probable that the agreement that is in dispute in this court, is a sham and, therefore, unenforceable.

[70] At this juncture, reference is made to s 115 of the Evidence Act on the issue of whether similar fact evidence is relevant and admissible to show a series of similar occurrences. Section 15 reads:

> Section 15 — Facts bearing on question whether act was accidental or intentional
>
> When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that the act formed part of series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

[71] On the facts of the present case, the issue was whether the agreement was intended to be a genuine sale of the land or was it a façade for a dubious moneylending transaction. The previous two agreements, therefore, constitute a series of similar occurrences. The further issue of the admissibility of similar fact evidence is the requirement that the evidence has to be probative enough to outweigh its prejudicial effect. It is trite law that this is an implied requirement in s 15 of the Evidence Act as explained in the case of *Azahan bin Mohd Aminallah v Public Prosecutor* [2005] 5 MLJ 334 (CA).

[72] In view of the fact that this is a civil case, the probative value required is of a lower standard, and not as high as required in a criminal trial. At this juncture, I look to the case of *Mood Music Publishing Co Ltd v De Wolfe Ltd* [1976] 1 All ER 763 (CA), where it was explained by Lord Denning:

> The admissibility of evidence as to 'similar facts' has been much considered in criminal law. Some of them have reached the highest tribunal, the latest of then being *Boardman v Director of Public Prosecution*. The criminal courts have been very careful not to admit such evidence unless its probative value is so strong that it should be received in the interests of justice; and its admission will not operate unfairly to the accused. *In civil cases the courts have followed a similar line but have not been so chary of admitting it. In civil cases the courts will admit evidence of similar facts if it is logically probative, that is if it is logically relevant in determining the matter which is in issue*; provided that it is not oppressive or unfair to the other side; and also that the other side has fair notice of it and is able to deal with it. (Emphasis added.)

[73] Striking similarity has long been the measure of probative value in courts of the commonwealth countries, following the case of *Director of Public Prosecutions v Boardman* [1975] AC 421. However, recently the requirement of striking similarity has been diluted by the Federal Court in *Public Prosecutor*

v Mohamad Roslan bin Desa [2011] 4 MLJ 826, which was followed subsequently in *Mohammad bin Abdullah v Public Prosecutor* [2011] 4 MLJ 549 (CA), *Wong Kok Chun lwn Public Prosecutor* [2012] 3 MLJ 593 (CA) and *Al-Bakhtiar bin Samat v Public Prosecutor* [2012] 4 MLJ 713.

[74] Although striking similarity is no longer a condition for the admissibility of similar fact evidence, other characteristics which are indicative of the probative value of the similar facts are still significant, such as the underlying link between the previous incidences and the current one, a nexus, similarities establishing a system, facts forming part of the same activity, and similar surrounding circumstances.

[75] The similarities pertaining to the two previous agreements were unusual, linked, and were strikingly similar enough to render a very high degree of probability of a pattern, where the plaintiffs are given loans which are cloaked as deposit payments upon execution of a sale and purchase agreement, when in actual fact execution of these documents are to render the property as security for the loans. The plaintiffs are then required to execute a document known as a deed of rescission and revocation, which is triggered upon repayment of the loan by the first plaintiff, cloaked in the form of agreed liquidated damages.

[76] All sums were paid to the said account number pursuant to the three agreements. Although counsel for the first defendant took the position that these unknown account numbers are not related to his client, the surrounding circumstances point to an irresistible inference that all three agreements are part of a money lending scheme, where the property is used as a security for these loans.

Whether the terms of the agreement were unusual and suspicious

[77] Counsel for the plaintiffs submitted that there were several unusual terms in the agreement executed by the plaintiffs with the first defendant.

[78] There was uncontroverted evidence in the form of a Valuation report which states that the market value of the property was between MYR460,000 (evidenced by the report of PA International Property Consultant Sdn Bhd, exhibited at p 84 of Part B of the CBD) and MYR500,000 (evidenced by the Government valuation, exhibited at p 165 of Part B of the CBD) which was much higher than the stated price of MYR214,000 in the agreement.

[79] Secondly, the deposit paid in this agreement was MYR40,000, despite the fact that the purchase price was supposedly MYR214,000. This constitutes

almost 17% of the purchase price, whereas only ten percent of the purchase price is the usual deposit for an ordinary dwelling house.

[80] Thirdly, the balance purchase price of MYR174,000, which coincidentally was also the redemption sum from the bank, was payable within 12 months from the date of execution of the agreement, with an additional month as extension ('the completion period'). This means that the completion period was 13 months, that is, when the purchase money was paid, the property transferred or conveyed to the first defendant, and when all other matters were finally settled between the parties: *Toh Teck Sun v Mandarin Gardens Pte Ltd* [1988] 2 MLJ 276.

[81] SP1 testified to say that parties had agreed upon such time period and when questioned, she said that such lengthy period was required for the purchaser to collect funds.

[82] At this juncture, it is pertinent to note that by virtue of s 57 of the Evidence Act, the court may take judicial notice of facts which are of general and common knowledge. 'When a Court takes judicial notice of a fact, it simply means that the Court declares that it will find that the fact exists': per Abdul Malik Ishak J (as he then was) in *Bank Bumiputra (M) Bhd v Mohd Ibrahim bin Salleh* [2000] 5 MLJ 778 at p 797.

[83] Facts which the court shall take judicial notice of are found in s 57(1) of the Evidence Act, which reads:

> Section 57 — Facts of which court must take judicial notice
>
> (1) The court shall take judicial notice of the following facts:
>
> (a) all laws or regulations having the force of law now or heretofore in force or hereafter to be in force in Malaysia or any part thereof;
>
> (b) all public Acts passed or hereafter to be passed by the Parliament of the United Kingdom, and all local and personal Acts directed by it to be judicially noticed;
>
> (c) articles of war for the armed forces or any visiting force lawfully present in Malaysia;
>
> (d) the course of proceedings in Parliament, in the federal legislatures that existed in Malaysia before Parliament was constituted, in the legislature of any State in Malaysia and in the Parliament of the United Kingdom;
>
> (e) the accession of the Yang di-Pertuan Agong and the accession of the Ruler of any state in Malaysia and the appointment of a Yang di-Pertua Negeri;

(f) the accession and the sign manual of the sovereign for the time being of the United Kingdom;

(g) the seals of all the courts of Malaysia, all seals which any person is authorised to use by any law in force for the time being in Malaysia or any part thereof, all seals of which English courts take judicial notice, and the seals of Courts of Admiralty and maritime jurisdiction and of notaries public;

(h) the accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any part of Malaysia, if the fact of their appointment to such office is notified in the Gazette or in any State Gazette;

(i) the existence, title and national flag of every state or sovereign recognised by the *Yang di-Pertuan Agong*;

(j) the ordinary course of nature, natural and artificial divisions of time, the geographical divisions of the world, the meaning of Malay and English words, and public festivals, fasts and holidays notified in the Gazette or in any State Gazette;

(k) the Commonwealth countries;

(l) the commencement, continuance and termination of hostilities between Malaysia or any part of the Commonwealth and any other country or body of persons;

(m) the names of the members and officers of the court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates and other persons authorised by law to appear or act before it;

(n) the rules of the road on the land, sea regulations and the rules of the air;

(o) all other matters which it is directed by any written law to notice.

[84] Section 57 of the Evidence Act merely sets out matters which the court must take judicial notice of, but the list therein is not exhaustive. 'The Court under s 56 may also take judicial notice of matters which are of common and general knowledge': per Hashim Yeop Sani FCJ in *Pang Ah Chee v Chong Kwee Sang* [1985] 1 MLJ 153 (FC).

[85] The manner in which the court takes judicial notice of facts was expounded by Justice Syed Agil Barakbah in *Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30 at pp 31–32:

> The important point to note is that section 57 does not prohibit the courts from taking judicial notice of other facts not mentioned therein. The matter which the court will take judicial notice must be the subject *of common and general knowledge and its existence or operation is accepted by the public* without qualification or

A contention. The test is that the facts involved must be so sufficiently notorious that it becomes proper to assume its existence without proof. (Emphasis added.)

B **[86]** A vital criterion of the fact taken judicial notice of is that sufficient notoriety must be attached to it, so as to make it proper for the court to assume its existence without proof. I am, therefore, of the view that judicial notice may be taken of the fact that ten percent is the normal deposit required for the down payment for a dwelling house.

C **[87]** I also take judicial notice that of the fact that the completion period for a sale and purchase agreement of a normal dwelling house, is three months plus an additional month with interest. This is unlike *Poraviappan s/o Arunasalam Pillay v Periasamy s/o Sithamharanm Pillai & Anor* [2001] 1 MLJU 742, where the completion date was a lengthy period, in view of the fact that the property D was listed as MYR3m, and which sale was subject to approval of the Foreign Investment Committee.

E **[88]** The market value of the property was in the region of between MYR460,000 and MYR500,000, whereas the subject matter was transacted at MYR214,000 almost 50% below the market price. Since it is undisputed that SP2 was in dire need of funds, it would be affront to common sense for him to have agreed to such a lengthy completion period.

F **[89]** No reason was given by the first defendant for the need to pay a larger deposit but SP2 explained that the MYR40,000 was in actual fact the loan sum given to the first plaintiff, and that the 13-month period of completion was to enable the repayment of interests for the loan taken by the first plaintiff, rather than for the first defendant to raise money to pay the balance purchase price as G testified by both SP1 and SD1.

[90] It is not disputed that the SD1 was a cash purchaser and did not require a bank loan to finance the purchase of the property. It is incredulous, therefore, to contend that a period of 13 months was required for SD1 to raise the money H to pay the balance purchase price, and that too after executing the sale and purchase agreement.

[91] Fourthly, the first plaintiff had lodged two caveats on the property through his relatives, Ramadevi Yanggarawna and Srivalli Narayanan on 18 I June 2017 and 6 September 2017 respectively (evidenced by the land search results exhibited at pp 68–60 of Part B of the CBD). If the agreement was in fact a true sale and purchase of the property, it does not make sense for the first plaintiff to caveat his own land, especially after the so called completion period had expired in June 2016.

[92] The above facts are strong indications that the parties had not intended to enter into a sale and purchase agreement but instead, executed the relevant documents to facilitate the property to be used as a security for a loan. The execution of the agreement, Form 14A, letter seeking redemption statement from HSBC and the CKHT forms (exhibited at pp 104–129 of Part B of the CBD), point to an irresistible conclusion that the agreement dated 4 May 2016 and other documents in relation to the same were a façade to a money lending transaction and, therefore, a sham agreement to cloak the true intention of the parties.

The credibility of SP1, SP2 and SD1

[93] It is trite law that, apart from applying the standard of proof required by law, a trier of fact, in order to arrive at a decision according to law, must judicially appreciate the evidence led before him upon the issue called for resolution. A decision arrived in the absence of a judicial appreciation of evidence is liable to appellate correction. Judicial appreciation is concerned with the process of evaluating the evidence for the purpose of discovering where the truth lies in a particular case. It includes, but is not limited to, identifying the nature and quality of the evidence, assigning such weight to it as the trier of fact deems appropriate, testing the credibility of oral evidence against contemporaneous documents as well as the probabilities of the case and assessing the demeanour of witnesses: per Gopal Sri Ram JCA (as he then was) in *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62.

[94] With regard to the credibility of witnesses, reference is made to s 146 of the Evidence Act, which reads:

> Section 146 — Questions lawful in cross-examination
>
> When a witness may be cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend —
>
> (a) to test his accuracy, veracity or credibility;
>
> (b) to discover who he is and what is his position in life; or
>
> (c) to shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

[95] Credibility concerns the opportunities for a power of observation of the witness, his accuracy for recollection, and capacity to explain what he remembers: *Kwang Boon Keong Peter v Public Prosecutor* [1998] 2 SLR 592.

[96] I also find instructive the words of Gillen J in *Sean Thornton (a minor by his mother and next friend) v Northern Ireland Housing Executive* [2010] NIQB

4 which was adopted in *McAllister v Campbell* [2014] NIQB 24:

> [12] Credibility of a witness embraces not only the concept of his truthfulness ie whether the evidence of the witness is to be believed but also the objective reliability of the witness ie his ability to observe or remember facts and events about which the witness is giving evidence.
>
> [13] In assessing credibility the court must pay attention to a number of factors which, inter alia, include the following:
>
> – The inherent probability or improbability of representations of fact
>
> – The presence of independent evidence tending to corroborate or undermine any given statement of fact
>
> – The presence of contemporaneous records
>
> – The demeanour of witnesses e.g. does he equivocate in cross examination
>
> – The frailty of the population at large in accurately recollecting and describing events in the distant past.
>
> – Does the witness take refuge in wild speculation or uncorroborated allegations of fabrication
>
> – Does the witness have a motive for misleading the court
>
> – Weigh up one witness against another

[97] The evidence of SP1 who was evasive and claimed ignorance to many material facts, in my view, should be treated with extreme caution. Furthermore, she could not justify several unusual features of the agreement, save to say that she merely took instructions.

[98] On the assessment and evaluation of the first plaintiff himself ('SP2'), I found him to be forthright and consistent. He did not mince his words or evade questions. He was forthright in saying that he signed the documents, but claimed that he was pressured to do so due to financial dire straits. In my view, he was earnest in his explanation, and did not strike me as someone whose evidence I had to view with circumspection. Although he had a tendency to veer into irrelevant matters, his evidence was intact, even after cross-examination. Discrepancies in his evidence, if at all, were minor, and on the whole, he was a convincing witness.

[99] The evidence of SD1, in contrast, was questionable and unsupported in his averments and claims. I found him to be unconvincing and implausible. He not only contradicted himself, but was evasive and feigned ignorance to questions which answers he felt was not favourable to him.

[100] SD1 failed to make due inquiries about the property, namely as to its whereabouts, and his claim that he only started collecting funds from so called relatives after the execution of the agreement, was not substantiated, and remained a bare averment.

[101] The documents that counsel for the first defendant provided to the court after the trial were also unconvincing as they did not support the evidence of SD1 during the trial. The details of employment and tax remittances provided, did not reveal that he was moneyed enough to cash-purchase. The bank statements provided did not support the narrative of the first defendant that, being a cash purchaser, he was in the habit of saving money. The facts on the whole rendered the activities of the first defendant highly suspicious.

[102] His explanation that his knowledge of the property was derived from one Sam, was also dubious, compounded by the fact that he was unable to produce Sam in court. SD1 had also failed to explain to the satisfaction of the court of how he came to know the account number of the plaintiffs, when he deposited the payment of MYR20,000 to the individual account of each plaintiff (exhibited at p 56 of Part B of the CBD).

[103] In my view, SD1 was unconvincing and incredulous. At this juncture, I am guided by Zabariah Mohd Yusof JCA (as she then was) in the Court of Appeal case of *Sediabena Sdn Bhd v China Comservice (Hong Kong) Limited* [2017] 1 LNS 2042, in the following words:

> ... The learned trial judge preferred the evidence of the plaintiff whom she viewed as 'more credible' in support of their contention, as compared to the witnesses of the Defendant who were 'evasive and blowing hot and cold in responding to questions in relation to the failure in providing the invoice in question as in so much it had portrayed untruthfulness on their part and also lack transparency as the parties to the agreement ...

[104] It is also pertinent to note the observation of Sir George Farwell in the Privy Council case of *Bombay Cotton Manufacturing Company v Motilal Shivlal* ILR 1915 39 Bom 386, PC, in addressing the credit of a witness upon cross-examination, that 'it is most relevant in a case where everything depends on the judge's belief or disbelief in the witness' story.'

[105] In the case before me, taking into account all the facts and circumstances, I disbelieved completely the narrative of SD1.

A Application of s 114(g) of the Evidence Act for failing to call the second plaintiff, CK Lim and Sam

[106] The court was urged to draw an adverse inference for the failure of the parties to call the following witness, namely:

B

(a) the second plaintiff;

(b) CK Lim; and

(c) Sam.

C

[107] Counsel for the first defendant urged the court to draw an adverse inference for the failure of the plaintiffs to call the second plaintiff, and CK Lim as witnesses.

D

[108] At this juncture, reference is made to illustration (g) of s 114 of the Evidence Act, which reads:

> Section 114 — Court may presume existence of certain fact
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> The court may presume:
>
> (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

E

F

[109] As stated in the Supreme Court in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, the evidence that is referred to in s 114(g) of the Evidence Act must not only be relevant, it must be material. In my view, the second plaintiff was not material as her evidence and the evidence of the first plaintiff would not be any different. Furthermore, the first plaintiff had already given evidence as SP1. Counsel for the first defendant had failed to demonstrate the materiality of the second plaintiff. There was no basis, therefore, for the plaintiffs to produce the second plaintiff as a witness.

G

H

[110] With regard to CK Lim, an adverse inference can be drawn only if there was deliberate withholding of the witness. This is implied in s 114(g). Deliberate withholding of the evidence may be inferred from the lack of a reasonable explanation for the failure to produce the witness: *Adel Muhd El-Dabbah v AG of Palestine* [1944] AC 156 (PC) and *Murugan v Lew Chu Cheong* [1980] 2 MLJ 139.

I

[111] In this case, it was explained that the plaintiffs had no idea who CK Lim was, as he communicated with SP2 via *WhatsApp*, clearly seen from the messages. Parallels are also drawn to the case of *Ngai Fong Lan (P) & Anor v Li Chee Loong* [2018] MLJU 1518, where it was stated by the learned judge, in observing a character (in that case, by the name of Kelvin) who had a similar role in a similar scheme, that 'it would be impossible to locate him after the scheme has been successfully executed'. Therefore, no adverse inference can be drawn against the plaintiffs for failing to produce CK Lim.

[112] With regard to the adverse inference against the first defendant, SD1 had mentioned that Sam was the agent that he had dealt with, and who had informed him of the details of the purchase.

[113] I refer to *Sabah Shell Petroleum Co Ltd & Anor v The Owners of and/or Any Other Persons Interested in The Ship or Vessel the 'Borcos Takdir'* [2012] 5 MLJ 515, where it was stated by Nallini Pathmanathan J (as she then was):

> ... The person best placed to explain fully the events of the day would have been the Master but the defendant failed to call the master as witness. Stating that he was uncooperative. Given the importance of this witness' evidence, the defendant's failure to subpoena him led this court to conclude that the master's evidence if produced, would affect the defendant adversely. This was a fit and proper case for this court to draw an adverse inference under s 114(g) against the defendant...

[114] In my view, Sam would have been the best person to explain the material facts that led to the signing of the agreement, which is shrouded in mystery. When asked if Sam would be called to give evidence on behalf of the first defendant, SD1 replied that Sam could not be contacted, and conveniently claimed that he did not have his telephone number anymore.

Similarities with the case of *Ngai Fong Lan (P) & Anor v Li Chee Loong*

[115] At this juncture, it is important to note the parallels to *Ngai Fong Lan (P) & Anor v Li Chee Loong* [2018] MLJU 1518 ('Ngai Fong Lan'), an unreported judgment delivered by Choo Kah Sing J, and affirmed by the Court of Appeal, a case which bore similarities in several aspects, and one which I look to in coming to the conclusion that the agreement between the plaintiffs and the first defendant was nothing more than a loan agreement, with the property used as a security, in violation of the provisions of the National Land Code ('the NLC').

[116] The similarities were that the purchase price was much lower than the actual value of the land; the down-payment was also more than the usual ten percent of the purchase price; the completion period was a lengthy period; unsubstantiated claims that the defendant had deposited the down-payment;

payments made by the plaintiffs to an account number subsequent to receiving the down-payment/loan; the mysterious money-lender who disappears subsequently after; and the ignorant solicitor who coincidentally is the same solicitor ('SP1') in this case.

[117] The case of *Ngai Fong Lan*, therefore, is a further ground to conclude that the agreement was nothing but a façade to a money lending scheme. It is germane to note that counsel for the first and second defendants had not distinguished, nor even referred to the case of *Ngai Fong Lan*.

[118] Instead, counsel for the first defendant relied heavily and drew parallels to the case of *R Saravanan Ramasamy v Yap Chee Loong & Ors* [2016] 1 LNS 547 ('R Saravanan Rama') to contend that the plaintiffs' claim should fail.

[119] In my view, reliance placed on this case is misconceived. *R Saravanan Rama* can be distinguished from the present case in several aspects. First and foremost, the plaintiff in that case claimed that he did not sign the sale and purchase agreement, whereas in the present case, SP2 never denied signing the agreement. In fact, SP2 admitted knowing what he had signed but averred that he signed it because he was desperate for funds. Secondly, there was evidence to show that the defendant in *R Saravanan Rama* had seen the property and had even met the plaintiff before signing the sale and purchase agreement. In the present case, the plaintiffs and the first defendant had no knowledge of each other whatsoever. Thirdly, in *R Saravanan Rama,* the learned judge found the plaintiff to be an inconsistent witness, whereas in the present case, I found SP2 to be credible and convincing. Finally, in *R Saravanan Rama,* the plaintiff offered no explanation for the non-production of Mr Tan (the equivalent of CK Lim) whereas in the present case, the court accepted the explanation of the plaintiffs for failing to produce CK Lim as a witness.

[120] I am the view, therefore, that the case of *Ngai Fong Lan* should be the point of reference, and not *R Saravanan Rama*.

Whether the agreement was valid and enforceable

[121] Security transactions recognised under the NLC are charges and statutory liens, found in the provisions from ss 241–281 of the NLC. The security transaction which is not recognised by the NLC but acknowledged by courts as a pure contract of sale is the *jual janji* transaction.

[122] The manner in which the property was used as a security for the loan is neither recognised by the NLC, nor is it a *jual janji* transaction. It was a blatant disregard for the provisions of the NLC.

[123] The agreement is, therefore, illegal, against public policy and defeats the purpose of the law. It falls squarely within the purview of s 24(b) and (e) of the Contracts Act 1950, which reads:

> Section 24 — *What considerations and objects are lawful, and what are not*
>
> The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, *it would defeat any law*;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) the court regards it as immoral, or *opposed to public policy*. (Emphasis added.)

[124] I also look to the recent case of *Kuan Chee Jon & Ors v SSF Construction Sdn Bhd* [2016] MLJU 1173; [2016] 8 CLJ 521, where it was held:

> ... The sale and purchase transactions were not SPA simpliciter as in reality it was a security for a loan. It had all the indication of a money lending transaction often practiced by those not licensed to do so. The SPA was merely a sham agreement and it was all the while intended to be a security for the loan. The transaction were rendered void by law. A written agreement is a sham where it incorporate clauses by which neither party intends to be bound and which is obviously a smoke screen to cover the real intentions of both contracting parties ...

The second defendant

Whether the second defendant was a bona fide purchaser for valuable consideration

[125] Although there was no direct nexus between the plaintiffs and the second defendant, the issue that needs to be addressed is the connection between the first defendant and the second defendant.

[126] Counsel for the second defendant submitted that there were no allegations made by the plaintiffs towards the second defendant, and that no evidence was adduced or led during trial to show that the second defendant did not acquire the said property in good faith.

[127] In my view, this argument is flawed, in view of the provisions of the NLC, which need to be examined in this respect to ascertain the party who had to discharge the legal burden.

[128] It is undisputed that the first defendant had transferred the land to the second defendant. Since it is my finding that the agreement was a sham and

against the law, the first defendant's title was defeated pursuant to s 340(2)(c), which reads:

> (2) The title or interest of any person or body shall not be indefeasible —
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was *unlawfully acquired* by the person or body in the purported exercise of any power or authority conferred by any written law. (Emphasis added.)

[129] However, since the first defendant had transferred the land to the second defendant, s 340(3) of the NLC is triggered. The provision reads:

> Section 340 — Registration to confer indefeasible title or interest, except in certain circumstances
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) —
>
> (a) *it shall be liable to be set as*ide in the hands of any person or body *to whom it may subsequently be transferred*; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> *Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser*. (Emphasis added.)

[130] Since the title of the first defendant is defeated pursuant to s 340(2)(c), it follows that the title transferred to the second defendant is also defeated, unless the second defendant is able to establish that he is a *bona fide* purchaser for valuable consideration.

[131] Reference on this point is made to *Abu Bakar Ismail & Anor v Ismail Hussin & Ors & Other Appeals* [2007] 3 CLJ 97, where it was stated by Gopal Sri Ram JCA (as he then was):

> ... Note that sub-s (3) in paras (a) and (b) employs the word 'subsequently'. What it means is this. If a registered proprietor gets on the register by any of the means set out in s 340(2), and if he or she to use the expression housed in the Code-subsequently — transfers his or her land to another, the title of that other is also defeasible unless he or she is a purchaser on good faith and for valuable consideration. Also protected are persons who take from such a purchaser. I may add that *the proof that one is a purchaser in good faith and for valuable consideration lies on the person asserting it* ...

[132] I also look to the case of *Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136; [2007] 4 CLJ 526 where it was stated by the Court of Appeal:

> The appellant's case must succeed because the vendors had no title to pass. You cannot give what you do not have — *nemo dat quod nom habet. And the only exception is in favour of a bona fide purchaser* ... (Emphasis added.)

[133] It is, therefore, for the second defendant, to prove that he is a bona fide purchaser for valuable consideration, rather than for the plaintiffs to prove that he did not act in good faith.

[134] 'Good faith' includes due inquiry, and implies not only an upright mental attitude, and clear conscience of a person, but also the doing of an act, showing that ordinary prudence has been exercised according to the standards of a reasonable man. 'Good faith' contemplates an honest effort to ascertain the facts upon which exercise of the power must rest; it must, therefore, be summed up as 'an honest determination from ascertained facts. Although the phrase may vary in the context of a different statute, subject and situation, honest intent free from taint or fraud, or fraudulent design, is a constant element of its connotation': per Azahar Mohamed FCJ in *T Sivam a/l Tharamalingam (as representative/administrator for the estate of Nagamuthu a/l Periasamy, deceased) v Public Bank Bhd* [2018] 5 MLJ 711; [2018] 6 CLJ 1 (FC).

Credibility of SD2

[135] The second defendant's narrative about the purchase of the property was that, he resided in Kuala Lumpur; he too is a cash purchaser; he had never seen the condition of the property; he purchased the property although he had knowledge that the plaintiffs were still residing in it; and that he was informed about the property through an agent, Jackson, whom was not produced. When asked if Jackson would be called to give evidence on behalf of the second defendant, SD2 replied that Jackson could not be contacted, and conveniently claimed not to have his telephone number anymore.

[136] These answers, which I find most unimpressive, are almost a regurgitation of the evidence of the first defendant.

[137] In the same way that I drew an adverse inference against the first defendant for failing to produce Sam, I also drew an adverse inference against the second defendant for failing to produce Jackson, as Jackson would have been the best person who could have explained the circumstances in which he came to know of the availability of the property for sale.

[138] Even when questioned by counsel for the third and fourth defendants, on how he managed to have MYR420,000 in cash, bearing in mind that he was a supplements distributor (an averment which he also could not prove), the second defendant proceeded to state the various sources of income that he relied on, to make the cash purchase. However, no evidence was tendered to support this assertion. This disproportionate amount of private funding for the purchase of property is inconsistent with the socio-economic profile of the second defendant, and in my view, raises questions on the elements of good faith and valuable consideration in s 340(3) of the NLC.

[139] The evidence of SD2, was questionable and unsupported in his averments and claims. I found him to be unconvincing and implausible. He was evasive to several questions which answers he felt was not favourable to him and at most times, conveniently provided the ubiquitous 'saya tak tahu' and 'saya tak ingat' to several questions. His evidence mirrored that of SD1, and some of his answers were incredulous.

[140] Counsel for the plaintiffs contended that the second defendant had knowledge of the JID when the property was transferred to him on 7 May 2018.

[141] During the proceedings, the first defendant informed the court that he had acquired the information about the JID from counsel for the second defendant. With the knowledge of the JID, on 20 June 2018, the first defendant filed a notice of application, and ultimately obtained an order setting aside the JID on 6 September 2018.

[142] Although counsel for the first and second defendants contended that the property had already been transferred to the second defendant before the first defendant was aware of the JID, I find the circumstances in which the first defendant came to know of the JID highly suspicious, bearing in mind that he was informed by counsel for the second defendant, and that the knowledge of a solicitor is regarded by the law as the knowledge of the client: *T Sivam a/l Tharamalingam v Public Bank Berhad*.

[143] Based on these circumstances and the evidence adduced by the second defendant which I found lacking in credibility, the second defendant is not entitled to the benefit of the proviso in s 340(3) of the NLC, as he had not proved to be a bona fide purchaser for valuable consideration.

CONCLUSION

[144] Although the plaintiffs prayed for a declaration that the first defendant is an unlicensed moneylender, there were no references or arguments

pertaining to the provisions of the Moneylenders Act 1951 in the submissions.

[145] Hence, based on the aforesaid reasons, and after judicious consideration of all the evidence, both documentary and oral, as well as submissions of counsel for all parties, I allowed the plaintiffs' claim (except for prayers (a) and (g) of para 30 of the amended statement of claim) with costs in the amount of MYR15,000 (MYR10,000 to be paid by the first defendant, and MYR5,000 by the second defendant), subject to allocatur fees.

Plaintiffs' claim allowed in part with costs of RM15,000 subject to allocator fees.

Reported by Mohd Kamarul Anwar